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In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN EVANS, TRUSTEE IN BANKRUPTCY FOR HEMPFIELD STORES, INC., PETITIONER

v.

S. S. KRESGE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's order of April 4, 1977, inviting the Solicitor General to express the views of the United States.

1. A. Respondent "Kresge" operates department stores throughout the country under both the Kresge and "K-Mart" trade names. Its "K-Mart" stores sought to achieve a reputation for selling quality merchandise at low prices and required a high volume of sales in order to be profitable (Pet. App. 27a). In order to generate customer traffic respondent sought to offer "one stop shopping" by providing a "K-Mart" food store operation under the same roof as its department store. Having little experience in the food merchandising business, it decided to license

its trade name to independent food store operators "who would conduct a K-Mart Food Store operation as part of or adjacent to a K-Mart department store" (*ibid.*).

In this case, petitioner's predecessor in interest, a food store firm, was organized for the purpose of operating food stores under the K-Mart trade name in two K-Mart facilities. Under the arrangement with Kresge, each food and department store was to appear to the public to be a single discount operation; in fact, each was independently owned and operated. The food stores, however, could not use the K-Mart brand name on their goods, checks, stationery or pricing labels, and Kresge did not sell to petitioner or dictate its sources of supply (Pet. App. 29a). The license agreement also required the food stores to

> (1) charge prices identical to those charged by Kresge on "like items," i.e., items sold by both the food stores and the department stores which prices were established by [Kresge] in the event the parties were unable to arrive at a mutually agreeable price; [(2)] maintain merchandise "competitive" in price with the same or similar goods offered for sale in the trading area; (3) limit non-food merchandise offered for sale to specific categories of goods * * *. [Pet. App. 30a-31a; footnote omitted.]

The two food stores' annual gross sales after 1965 exceeded $4 million (Pet. App. 30a, n. 4), of which two to five percent were "like items" (Pet. App. 74a). In July 1969 the food stores went bankrupt (Pet. App. 28a).

Contending that the restrictions in the license agreement contributed to the food stores' collapse, the trustee sued Kresge for treble damages under Section 1 of the Sherman

Act, 26 Stat. 209, as amended, 15 U.S.C. 1, alleging that the restrictive provisions were illegal *per se*. Kresge denied that the restrictions were illegal *per se*, and further contended that the challenged restrictions were lawful under the rule of reason[1] (Pet. App. 26a).

B. On cross-motions for summary judgment, the district court dismissed the complaint for lack of subject-matter jurisdiction because it found that the restrictions did not affect interstate commerce (Pet. App. 44a-65a). In the alternative, however, it held that the arrangement was not illegal *per se* because Kresge and the food stores were not competitors. Moreover, it held the restrictions were not an unreasonable restraint of trade under the rule of reason because the primary purpose of the arrangement— jointly to provide a one-stop shopping system under a single trade name—was lawful, and the restrictions were reasonably necessary to that purpose (Pet. App. 72a-76a). In so ruling, the district court had before it, *inter alia*, an uncontradicted affidavit submitted by Kresge in which one of the food stores' founders stated that the primary purpose of the arrangement was to create the image of a unified discount operation being conducted under one roof and trade name (Pet. App. 20a-23a).

C. The court of appeals held that the arrangement affected interstate commerce and affirmed the district court's decision on the merits (Pet. App. 6a-11a). It agreed that the restrictions should not be tested under the *per se* rules. The arrangement, it found, combined elements of franchising, trademark licensing, and joint merchandising

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[1]The agreements also contained restrictions concerning fair trade agreements and trading stamps, and a requirement that certain equipment be acquired from Kresge, but on appeal petitioner abandoned his challenge to these provisions (Pet. App. 5a, n. 9).

into a novel form of hybrid business arrangement, analogous to a "concession," with which the courts had no experience. It could not conclude that this arrangement almost invariably would have a pernicious effect on competition warranting condemnation as illegal *per se* (Pet. App. 11a-18a). It agreed with the district court that simple price-fixing was not involved, even as to the commonly sold items, because the parties held themselves out to the public as a single entity and there was no real competition between them (Pet. App. 16a-17a).

In analyzing the arrangement under the rule of reason, the court noted that petitioner did not contest Kresge's contention that the restrictions were reasonable. It held that the uncontradicted affidavit describing the purpose of the arrangement constituted "the only 'relevant facts,' " and that the restraints were incidental to a legitimate business operation that did not suppress or destroy competition (Pet. App. 18a-19a, 23a).

2. A. The decision of the court of appeals is consistent with this Court's decisions defining the circumstances in which conduct is illegal *per se* under the Sherman Act.[2] The court of appeals recognized the settled rule that agreements between competitors to fix or stabilize prices are illegal *per se* (Pet. App. 12a-13a), and that franchising through a trademark license does not insulate the licensor from that principle (Pet. App. 14a, n. 23).[3] The court correctly concluded, however, that the novel merchandising arrangement involved, which held out to the public the image of a

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[2] *White Motor Co.* v. *United States*, 372 U.S. 253; *United States* v. *Northern Pacific Railway Co.*, 356 U.S. 1; *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 309-310.

[3] *United States* v. *Sealy, Inc.*, 388 U.S. 350; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593.

single entity pursuing a single discount pricing policy, did not involve separately competing entities, even with respect to commonly sold items.

The court properly recognized that it would be inappropriate to assess this hybrid business arrangement under antitrust criteria developed for other situtations (Pet. App. 15a). This was not a case in which two actual or potential competitors in the same line of commerce sought to eliminate price competition between each other by combining their operations under cover of a franchise, trade license or joint venture. See *United States* v. *Sealy, Inc.*, 388 U.S. 350, and *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593; cf. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596. Instead, this is a novel arrangement whereby two firms in different lines of commerce sought to engage jointly in complementary business operations under the same roof and trade name. Petitioner did not attempt to show that either firm would have independently undertaken a dual food-department store operation. Kresge desired the traffic volume generated by a food store operation and conditioned its lease commitment on obtaining such a "partner"; the food store operators sought to benefit from the K-Mart name, its advertising and customers (Pet. App. 21a).

Contrary to petitioner's assertion (Pet. 10), the court's decision was not based solely upon its finding that the parties never intended to compete with each other. Rather, the court viewed the evidence of intent as corroborating the "fact of noncompetition * * * dictated by the practical business arrangement of the parties" (Pet. App. 17a-18a). Cf. *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86. In view of the unusual relationship between the parties, the lack of judicial experience with such arrangements, the fact that the principal purpose of the parties

was legitimate, and the incidental nature of any competitive restraint, we submit that the court correctly refused to apply *per se* standards to the challenged arrangement. *White Motor Co.* v. *United States,* 372 U.S. 253.

B. Petitioner did not contend in either court below that the validity of the arrangement under the rule of reason should not have been decided on summary judgment. In the district court, despite respondent's argument that the restrictions were not illegal *per se,* and that they were justified under the rule of reason, petitioner contended solely that the practices were illegal *per se* and therefore were unreasonable as a matter of law. It did not contest respondent's affidavits describing the origins, nature and purpose of the arrangement, or argue that assessment of restrictions under the rule of reason was inappropriate on summary judgment. Fed. R. Civ. P. 56(e). It contended only that the jurisdictional issue should not be decided on summary judgment (Pet. App. 40a-44a).

Before the court of appeals, petitioner principally argued that the restrictions were illegal *per se,* that the amount of commerce involved was immaterial, and that the ancillary restraints doctrine was inapplicable to conduct illegal *per se* (Br. for Appellant, pp. 13-33). Indeed, the court of appeals noted that petitioner had "failed to address itself to the issue of the restraints' legality under the rule of reason" (Pet. App. 19a), just as he had failed to discuss this issue in the district court.

Petitioner now contends that in the court of appeals he argued alternatively that if his *per se* contentions were rejected, the summary judgment should have been reversed to enable him to pursue discovery (Br. for Appellant, pp. 37-42). But this argument assumed that if the *per se* analysis were rejected, the case would nevertheless be remanded for trial. We do not understand the basis for this assumption,

since the district court alternatively had held on the merits that the arrangement was reasonable, and had noted the absence of any serious contention by petitioner that "the primary purpose of the agreement was anything other than what [Kresge] says it was—attracting customers into the K-Mart stores by providing convenient one-stop shopping and quality merchandise at low prices" (Pet. App. 72a).

This Court has held that in complex antitrust litigation, where motive and intent play leading roles, summary judgment should be used sparingly. See, *e.g., Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 394 U.S. 495, 500; *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473. In this case, however, which has been pending since 1971, petitioner had the opportunity to, and did conduct extensive discovery. Indeed, Kresge's first motion for summary judgment was denied in 1972 to give petitioner an opportunity for discovery (Pet. App. 25a). In these circumstances, further discovery is unlikely to illuminate the issues. The court of appeals' failure, *sua sponte,* to rule that summary judgment was inappropriate, is not plain error. *First National Bank of Arizona* v. *Cities Service Co.,* 391 U.S. 253, 284-290.

Since the propriety of summary judgment was not raised or considered by the court of appeals, and petitioner had "prolonged and extensive discovery" (Pet. App. 25a), there is no reason for this Court to consider petitioner's belated arguments that summary judgment was improper. Nor, in view of petitioner's failure to present the question here, should the Court consider whether the restrictions were reasonable ancillary restraints.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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